IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 64

ROBERT SWAIN,

Petitioner

v.

ALABAMA,

Respondent

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

I.

WHETHER THE METHOD OF SELECTION OF THE NAMES OF PERSONS SWORN TO SERVE AS PETIT JURORS IN TALLADEGA COUNTY, ALABAMA, RESULTS IN THE ARBITRARY AND SYSTEMATIC EXCLUSION THEREFROM OF NEGROES ON RACIAL GROUNDS IN DEPRIVATION OF PETITIONER'S RIGHTS TO DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS.

II.

WHETHER THE METHODS USED IN SELECTING NAMES OF PERSONS TO BE PLACED ON THE JURY ROLL AND IN THE JURY BOX AND THE NAMES OF PERSONS CALLED AS JURY VENIRES IN TALLADEGA COUNTY, ALLABAMA, RESULT IN THE ARBITRARY AND SYSTEMATIC EXCLUSION OF NEGROES ON RACIAL GROUNDS FROM SERVICE ON GRAND AND PETIT JURIES IN THAT COUNTY IN DEPRIVATION OF PETITIONER'S RIGHTS TO DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States.

This case also involves the following statutes:

Act No. 475, Acts of Alabama, Special-Regular Session 1955, Vol. 2, p. 1081.

Title 30, secs. 1-100, Code of Alabama 1940, as amended (Recompiled 1958).

STATEMENT

In addition to the Statement of the Case as set forth by the Petitioner, the Respondent respectfully points out the following further facts:

The Petitioner has been represented throughout by Negro Counsel of his own choosing.

On the hearing of the Motion to Quash the Indictment, evidence was adduced that four or five Negroes were on the venire from which the Grand Jury which indicted the Petitioner was drawn and that the names of two Negroes were drawn from that venire and actually served on that Grand

Jury (R. 8); that as many as three Negroes have served on previous Grand Juries in Talladega County (R. 9); that there have not been over three or four Grand Juries in Talladega County since 1953 which have not had members of the Negro race actually serving thereon (R. 10); that many of the Negroes qualified for Jury duty have either been excused or are exempt from such duty (R. 12, 17, 18); that as many as seven and on one occasion as many as thirteen Negroes' names have appeared on the Jury venire (R. 18, 19); that as many as eighty percent of the Grand Juries organized since 1953 have had Negroes serving thereon (R. 21); that there is no discrimination on account of race or color by the Jury Commission of Talladega County in placing the names of qualified persons on the Jury Roll (R. 55, 61); that among the methods used by the Jury Commissioners in securing names of persons to be placed on the Jury Roll have been contacting officers of various plants employing both Negroes and Whites to secure the names of employees working there considered as qualified jurors, requesting various colored people to furnish lists of names of persons they would consider as qualified to serve as jurors, using city directories, telephone books, church rolls, club rolls, registered voters lists, and contacting reputable citizens (R. 64, 65); that in compiling the Jury Roll, no distinction is made between White persons and Negroes and the names are typed on the list alphabetically (R. 73) with the occupation and address following the name; that plain white cards of the same size, texture, and quality are used for making up the cards to be placed in the Jury Box (R. 73, 74); that it is often difficult to tell from an address whether the name is that of a White man or a Negro (R. 85); that names are obtained by the Jury Commission from a Farmers' Cooperative, the Rural Electrification Association, and the Farm Bureau, all of which have Negro members (R. 93, 94, 95); that in securing the names of qualified jurors the Jury Commissioners talked with both White and Negro people (R. 112).

Prior to the commencement of the taking of the testimony, it was stipulated between Counsel that the jury venire of one hundred from which the Petit Jury was struck included eight members of the Negro race (R. 202). The Petitioner then moved to have the Court declare void the Petit Jury selected to try the case on the ground that there were no Negroes selected to *serve* thereon, among other things, which Motion was overruled (R. 205) (emphasis added).

ARGUMENT

I.

THE METHOD OF SELECTION OF THE NAMES OF PERSONS SWORN TO SERVE AS PETIT JURORS IN TALLADEGA COUNTY, ALABAMA, DOES NOT RESULT IN THE ARBITRARY AND SYSTEMATIC EXCLUSION THEREFROM OF NEGROES ON RACIAL GROUNDS IN DEPRIVATION OF PPETITIONER'S RIGHTS TO DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS.

The right to peremptory challenges, where given by law, is absolute, and cannot be questioned either by opposing counsel or the Court. 31 Am. Jur. 195, Jury, § 233.

It has been consistently held that where there is no discrimination or violation of constitutional or other rights in the selection of veniremen or prospective jurors in the trial of a Negro Defendant, the exercise by the prosecution of its peremptory challenges to challenge Negroes drawn for service, with the result that there are no Negroes on the jury finally selected to try the Defendant, does not result in either error in the constitution of the jury or a violation of the Defendant's rights. *Hall v. United States*, 83 App. D.C. 166, 168 F.2d 161, 4 ALR 2d 1198, cert. den. 334 U.S. 853, 92 L.ed. 1775, 68 S.Ct. 1509, reh. den. 335 U.S. 839, 93 L.ed. 391, 69 S.Ct. 9; *State v. Logan*, 344 Mo. 351, 126 S.W. 2d 256, 122 ALR 417.

As the Supreme Court of Alabama pointed out in its opinion in this case:

> "It has long been held that, where allowed by statute, peremptory challenges may be used without any assigned or stated cause. *Pointer v. United States*, 151 U.S. 396, 14 S.Ct. 410, 38 L.ed. 208. Both the Federal and Alabama jurisdictions have statutes providing for peremptory challenges. Code of Alabama 1940, Title 30, § 53; 28 U.S.C. § 1870; Rule 24(b), Federal Rules of Criminal Procedure, 18 U.S.C., pp. 3407, 3423. The fact that the prosecution peremptorily strikes every Negro from the jury panel in a case where the Defendant is a Negro does not constitute a violation of the Defendant's constitutional rights of due process and equal protection of the law. *Hall v. United States* (supra); *United States v. Daniels*, (E.D. Pa.) 191 F.Supp. 129; *Watkins v. State*, 199 Ga. 81, 33 S.E. 2d 325, *People v. Roxborough*, 307 Mich. 575, 12 N.W. 2d 466; *State v. Logan* (supra). The following statement by the Michigan Supreme Court in the *Roxborough* case is particularly appropriate here:
>
> " 'The reason counsel may have for exercising peremptory challenges is immaterial. This right has been granted by law, and it may be exercised in any manner deemed expedient, and such action does not violate any of the constitutional rights of an accused. If Appellant's argument is carried to its logical conclusion, it would do away with the basic attribute of the peremptory challenge, because, if such argument is accepted in all cases involving Defendants of the Negro race, the prosecutor, upon challenging prospective jurors of that race, would either have to assign a cause for such challenge or take the risk

of a new trial being granted on the ground that he discriminated because of color; as a result, no one could safely peremptorily challenge a juror where the Defendant was of the same race as the juror.'" In *Hall v. United States*, supra, the Court said:

> "The requirements of due process were met when there was no racial discrimination in the selection of the veniremen. The government as a litigant was entitled to exercise twenty peremptory challenges, which means that its counsel could exclude from the jury that number of persons without assigning, or indeed without having, any reason for doing so. The Constitution does not require that the Appellants, being Negroes, should be tried by a jury composed of or including members of that race. They legitimately sought to obtain the fancied advantage of having Negroes on the jury by using their peremptory challenges only against white members of the panel."

In *Harraway v. State*, 203 Ark. 912, 159 S.W. 2d 733, cert. den. 317 U.S. 648, 87 L.ed. 521, 63 S.Ct. 42, the Court held that there was neither error in the constitution of the trial jury nor a violation of the Defendant's rights because four Negroes who were drawn for service thereon were excused by the prosecuting attorney in the exercise of his peremptory challenges. The Court said that the Defendant "was not entitled to any particular juror, but was entitled to trial by a fair and impartial jury."

In a similar situation in *Whitney v. State*, 43 Tex. Crim. 197, 63 S.W. 879, it was held that there was no establishment of discrimination, and that to so hold "would be equivalent to guaranteeing a Negro Defendant a certain number of

Negroes on the jury to try him," which was not required by the Fourteenth Amendment.

As the Court said in *Watkins v. State*, the right to peremptory challenges may be exercised in a given instance because the prospective juror was a "banker, a farmer, a merchant, a mechanic, a baldheaded man, a black man, a brown man or a yellow man."

The Petitioner's reference on page 14 of his Brief to the 1961 Report of the Commission on Civil Rights, Vol. 5, pp. 93, 99, is not authority for anything as an examination of that Report will demonstrate.

On page 93 of that Report, it was stated that the Commission's staff interviewed nine attorneys of both races in Birmingham, Alabama in March, 1961, and in note 49 thereto it was stated that all agreed that there was a common agreement among local attorneys that Negroes will be stricken from the panel. The telephone book lists approximately 900 attorneys in the City of Birmingham. Thus statements made by only about 1/10th of 1% of the practicing attorneys in Birmingham were made the basis for the Commission's conclusions. Furthermore, this has no reference to Talladega County.

Again, on page 99 of that Report, it was stated that "The staff learned from a number of white attorneys and a Federal judge in Alabama in March 1961, that the prosecution (sometimes even the local United States Attorney) and defense counsel frequently agree to challenge any Negroes who appear on jury panels." The Report does not state how many white attorneys were interviewed, but they obviously were very few in view of the fact that the Alabama State Bar Association reports that approximately 2,037 attorneys are licensed in this State.

In addition, there are seven Federal Judges in this State, three United States Attorneys, and sixty seven Counties, each having a Circuit Court or other Courts of Record in which jury cases are tried.

The unreliability of this Report as authority is so glaring that it merits no consideration whatsoever.

Furthermore, that every Report, on page 97 admits the validity of the system of peremptory challenges, as follows:

> "The second theory has to do with the right to be tried by an impartial jury. The Supreme Court has pointed out that 'a Negro who confronts a jury on which no Negro is allowed to sit . . . might very well say that a community which purposely discriminates against all Negroes discriminates against him.' This does not mean that every Negro accused is entitled to a racially representative jury. Such a guarantee would require the State to select juries on a race-basis, which is prohibited. It would also upset the whole institution of challenges, an integral part of the jury system. It must be remembered that the State simply provides a panel of persons qualified for petit jury service; the ultimate selection of jurors from the panel is made by the accused and the prosecution. Each side usually has the right to reject a specified number of the prospective jurors without having to give any reason for the rejection. This limited number of 'peremptory' challenges may be exercised capriciously or for unworthy reasons, and such use of them is no grounds for objection. Each party is generally entitled to reject additional persons on the panel upon showing a good reason why the challenged persons could not render a fair verdict in the case. The right to make 'peremptory chal-

lenges' and 'challenges for cause' is of benefit to both sides. Conceivably, if the prosecution had to restrict its challenges so as to insure that a member of the accused's race sat on the petit jury, it might well be unfairly handicapped."

The argument advanced is, therefore, specious to say the least.

II.

THE METHODS USED IN SELECTING THE NAMES OF PERSONS TO BE PLACED ON THE JURY ROLL AND IN THE JURY BOX AND THE NAMES OF PERSONS CALLED AS JURY VENIRES IN TALLADEGA COUNTY, ALABAMA, DOES NOT RESULT IN THE ARBITRARY EXCLUSION OF NEGROES ON RACIAL GROUNDS FROM SERVICE ON GRAND AND PETIT JURIES IN THAT COUNTY IN DEPRIVATION OF PETITIONER'S RIGHTS TO DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS.

The Petitioner has wholly failed to show, either in support of his various Motions or by way of argument in support of this Petition, that there has been any arbitrary or systematic exclusion of Negroes from the Grand and Petit Juries of Talladega County, Alabama.

The Petitioner has attempted to base his Petition on a hypothetical theory.

It is our contention that the relief sought should be based on the Record and on the facts.

Therefore, we shall now proceed to the truth and not rely on generalities, as Petitioner does.

The general provisions with respect to juries and the Jury Commissions of the several Counties in Alabama are found in Title 30, Sections 1 to 100, Code of Alabama 1940, as amended (Recompiled 1958). Except for certain of these general provisions, the matter is legally regulated in Talladega County, Alabama by Act No. 475, approved September 9, 1955, Acts of Alabama, Special-Regular Session 1955, Volume 2, page 1081.

When the Jury Roll is made up and the Jury Box is filled, the Jury Box is then delivered into the custody of the presiding Judge of the Circuit Court. Under the general provisions of the Law of Alabama, the Jury Box is kept in the office of the Probate Judge, and the President of the Jury Commission keeps one of the keys to the Jury Box (Title 30, Section 20, and Act No. 475, Section 1). The other key is kept by the presiding judge of the Circuit Court. More than twenty categories of individuals are exempt from jury duty in Alabama, based on the nature of the employment of the individuals involved (Title 30, Section 3). The qualifications of the jurors are prescribed by Title 30, Section 21.

By virtue of Act No. 475, the Jury Box of Talladega County is filled every two years, the Jury Commission is required to arrange the Jury Roll alphabetically and by precinct and by numerical order and cause to be written on the Jury Roll opposite each name placed thereon the name, occupation, and place of business of each person selected, and if the residence has a street number, it must be given. Upon completion of the Jury Roll, the Jury Commission is required to cause to be prepared plain white cards, all of the same size and texture and shall have written on the cards the name, occupation, place of residence, and place of business of the persons whose names have been placed on the Jury Roll; writing or printing but one person's name, occupation, place of residence and of business on one card. The cards

bearing the names of all jurors who served as jurors during the two years next preceding September 15th of that year are required to be segregated, removed, and set aside, to be continued on the Jury Roll as qualified jurors but not placed in the Jury Box at that time, but retained as reserve.

A person can be a qualified juror without being a qualified voter, and can be a qualified voter and not a qualified juror. In Talladega County, Alabama, the registration list of qualified voters is not regularly used in making up the Jury Roll.

In his Argument, the Petitioner cites certain census figures as to the male population of both races over the age of twenty-one years in Talladega County, Alabama. It should be pointed out that the Statutes do not require the Jury Roll to contain a certain percentage of the eligible male population regardless of race or color. Even if they did, the Jury Roll conceivably would contain less than a fixed percentage of the eligible *White* males as well as less than a fixed percentage of the eligible *Negro* males, since the percentage would be calculated on the *total* population, which includes women and children as well as those who have been convicted of crimes, mental incompetents, those suffering from physical disablements, aliens, and others ineligible to serve. The Argument advanced is too specious to be dignified by further comment.

There is nothing in the Constitution and Laws of the State of Alabama or in the Constitution and Laws of the United States which requires that a Jury Roll and a Jury Box be compiled in the exact ratio of the eligible White males to the eligible Negro males.

As was said by the Supreme Court of Alabama in *Fikes v. State* (1955), 263 Ala. 89, 81 So.2d 303, 309-311, rev. on other grounds, 352 U.S. 191, 1 L.ed. 2d 246 (a case, by the

way, in which two of the Attorneys representing the Petitioner here, represented the Appellant):

> "It is not appropriate to say that they [Negroes] are entitled to be represented in the same proportion as the whites are represented unless their qualifications are in the same proportion. That does not appear. The comparison without that is not an accurate guide for a determination of the question."

This Court, in *Akins v. Texas*, 325 U.S. 403, 89 L.ed. 1892, 1898, 65 S.Ct. 1276, has stated that "fairness in selection has never been held to require proportional representation of races upon a jury." In that case, it was further stated that "the mere fact of inequality in the number (of a racial group) selected does not in itself show discrimination. A *purpose* to discriminate must be present which may be proven by systematic exclusion of eligible jurymen of the proscribed race, or by unequal application of the law to such an extent as to show intential discrimination." [emphasis supplied.]

The Law does not require that racial groups be recognized in the composition of juries; however, their continual exclusion or mere symbolic representation will constitute discrimination.

In *Cassell v. Texas*, 339 U.S. 282 (286-287), this Court stated:

> "Jurymen should be selected as individuals, on the basis of individual qualifications, and not as members of a race.
>
> "We have recently written why proportional representation of races on a jury is not a constitutional requisite. Succinctly stated, our reason was that the Constitution requires only a fair jury selected with-

> out regard to race. Obviously the number of races and nationalities appearing in the ancestry of our citizens would make it impossible to meet a requirement of proportional representation. Similarly, since there can be no exclusion of Negroes as a race and no discrimination because of color, proportional limitation is not permissible. That conclusion is compelled by the United States Code, Title 18, § 243, based on § 4 of the Civil Rights Act of 1875. While the language of the section directs attention to the right to serve as a juror, its command has long been recognized also to assure rights to an accused. Prohibiting racial disqualification of Negroes for jury service, this congressional enactment under the Fourteenth Amendment, § 5, has been consistently sustained and its violation held to deny a proper trial to a Negro accused. Proportional racial limitation is therefore forbidden. An accused is entitled to have charges against him considered by a jury in the selection of which there has been neither inclusion or exclusion because of race."

The evidence clearly shows that Negroes were placed on the Jury Roll, that the names of Negroes were actually drawn from the Jury Box, that Negroes were on the venires; and that, in fact, two Negroes served on the Grand Jury which indicted the Petitioner. The Petitioner has wholly failed to show that he was discriminated against because of his race or color. To the contrary, his own evidence adduced in respect to his several Motions has shown without equivocation that he was accorded the utmost consideration (probably more than that to which he was entitled in view of the heinous crime of which he was found guilty by a jury of the vicinage). Why, because he is a Negro, should he be entitled to preferential treatment?

The author of this Brief knows from personal experience, both as a defense Attorney in Alabama, Virginia, and the District of Columbia, as well as four years as Assistant Commonwealth's Attorney of the City of Alexandria, Virginia (a sum total of more than 29 years in various phases of the Practice of the Law), that Negroes with whom he has had contact (and they have been numerous) have invariably insisted that they want *no* Negroes to sit in judgment on them. The reason given to the writer was that each and every one of them felt that they would be more harshly treated by members of their own race if they were indicted, tried, convicted, and sentenced by their own kind. They have always seemed to have had an antipathy toward being adjudged by their own. Whether it has been due to some fear that their own race would punish them unduly for their crimes in order to set an example for the remainder of the community is not known. However, this is a fact which must be faced without regard to legal semantics.

Therefore, it seems only appropriate to mention the fact that Judge Richard T. Rives of the Fifth Circuit Court of Appeals, in his opinion for the Court in *United States, ex rel. Willie Seals, Jr., v. Wiman*, 304 F.2d 53, repeated the proposition that fairness in selection does not require proportional representation of race upon a jury venire, citing *Akins v. Texas*, 325 U.S. 403, 89 L.ed. 1692, 1696, 65 S.Ct. 1246.

We feel that the Supreme Court of Alabama was eminently right when it said that it found it "difficult to see wherein there was discrimination as alleged in these motions. In what way the Talladega County Jury Commission has discriminated in filling the jury box is not made to appear." (R. 391).

We also feel that the Supreme Court of Alabama was again eminently correct when it concluded that:

> **"From the evidence in this case, we see no basis for holding that the Jury Commission discriminated against the Negro race or followed a policy of 'token' inclusion of members of that race . . . Our view is that appellant has not established a prima facie case in support of his motion to quash the indictment." (R. 394)**

The Petitioner ignores entirely the almost total failure of Negro leaders in the County to assist the Jury Commissioners in any way in securing the names of qualified Negroes to be placed on the Jury Roll. Yet he attempts to blame the disparity of racial representation on the White people. He refuses to lay the blame where it really lies—that is, on his own people.

The mere filing of Motions to Quash the Indictment, the Grand and Petit Jury venires, and the trial Jury panel does not relieve the Petitioner from the burden of supporting his allegations by proof, nor does such mere filing place the burden on Respondent of refuting such allegations.

Our view coincides with that of the Supreme Court of Alabama that Petitioner has not established a prima facie case in support of his Motions.

The Petitioner adopted the same evidence in support of his Motion to strike the Petit Jury venire as was used in support of his Motion to Quash the Indictment since both the Grand and Petit Jury venires were drawn from the same Jury Roll and Jury Box.

He makes no contention or argument that the method of drawing the names from the Jury Box results in discrimination. Indeed, this he cannot do since it is clear that under the procedure established by Alabama law this cannot result.

His argument on this point then is but a repetition of his argument that the Jury Roll was unconstitutionally compiled.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

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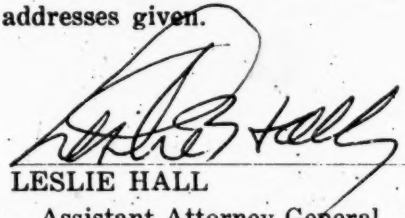
CERTIFICATE OF SERVICE

I, Leslie Hall, one of the Attorneys for Respondent, and a Member of the Bar of the Supreme Court of the United States, hereby certify that on the 23rd day of September, 1964, I served the requisite number of copies of the foregoing Brief upon Jack Greenberg, Constance Baker Motley, James M. Nabrit, III, Suite 2030, 10 Columbus Circle, New York, New York 10019, and Orzell Billingsley, Jr., and Peter A. Hall, 1630 Fourth Avenue North, Birmingham, Alabama, Attorneys for Petitioner, by depositing the same in the United States mail, first class postage prepaid, and properly addressed to them at the addresses given.



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